Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-140

REITHOFFER'S, INC., *Appellant*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Appellee*

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

FREDERIC LEE RUCK
County Attorney

WILLIAM DANA SHAPIRO
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 691-2421

Counsel for Appellee

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Appellee

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellee Board of Supervisors of Fairfax County, Virginia, moves that the above-captioned appeal from the Supreme Court of Virginia be dismissed.

OPINIONS BELOW

The opinion of the Circuit Court of Fairfax County, Virginia, as rendered at the hearing of this cause, is unrecorded but is reprinted from the transcript of the

trial court's proceedings as Appendix C to Appellant's Jurisdictional Statement. The final order of the Circuit Court is reprinted as Appendix D to Appellant's Jurisdictional Statement. The Supreme Court of Virginia's rejection of Appeal and denial of Petition for Rehearing are reprinted as Appendix E and Appendix F to Appellant's Jurisdictional Statement.

JURISDICTION

Appellee Board of Supervisors of Fairfax County, Virginia, concurs in the statement of jurisdiction as set forth by Appellant (App. Br., pp. 2-3), but states that no substantial federal questions are presented by the Appeal.

STATEMENT OF THE CASE

On February 19, 1974, Appellant, Reithoffer's, Inc., filed a bill of complaint in the Circuit Court of Fairfax County challenging the constitutionality of § 30-7.2.6.1.4 Fairfax County Zoning Ordinance (1961), as amended, dealing with the operation of carnivals, circuses, fairs, horse shows, the sale of seasonal commodities, and other similar activities. An amended bill of complaint was subsequently filed on June 6, 1974, realleging the challenge contained in the original bill of complaint and also challenging the constitutionality of § 7-3 Fairfax County Code (1961), as amended, which imposes a County license tax on carnivals.

On July 25, 1974, after hearing *ore tenus* before the Circuit Court of Fairfax County, Virginia, the Honorable Barnard F. Jennings rendered his oral opinion that § 7-3 is a legal, constitutional and valid ordinance and that § 30-7.2.6.1.4 is a legal, constitutional and proper exercise of the police power, except insofar as it required that members of local organizations sponsoring carnivals must collect money and handle ticket sales at carnival concessions, shows, and games. This ruling was carried forward in a final decree entered on October 9, 1974, from which Appellant, Reithoffer's, Inc., appealed to the Supreme Court of Virginia. On February 26, 1975, Appellant's petition for appeal was rejected, and its petition for rehearing was likewise denied on April 28, 1975. Appellant's notice of appeal to the United States Supreme Court was filed on July 23, 1975, and its Jurisdictional Statement was filed with the Clerk of the Supreme Court on July 25, 1975.

Appellee Board of Supervisors of Fairfax County, Virginia, agrees with the statement of the text of the two challenged ordinances reprinted as Appendix A and Appendix B of Appellant's Jurisdictional Statement.

Two witnesses were presented at trial by Appellant. The first witness, Mr. Knowlton, Fairfax County Zoning Administrator, stated that carnivals may operate in Fairfax County as a use of right in the I-G (Industrial General) and I-L (Industrial Limited) zoning categories without the requirement of sponsorship by a local civic association, and that they may operate with such sponsorship as a special use in most of the residential and commercial zones of the County. (R., 18). He further testified that there are sites zoned to the I-G and I-L categories which have adequate area, access, parking facilities, and topography to permit the operation of carnivals (R., 40-45).

Appellant's other witness, Mr. Reithoffer, testified about the operation of his carnival business. He stated that his carnival operation travelled from place to place, operating in any one location for periods of one

week to one month (R., 56). He testified that his show had not operated in Fairfax County in 1974, but had operated with sponsorship in the County in each of the preceding eight years (R., 70). It was stipulated by the parties that § 30-7.2.6.1.4 was in effect in each of the years when Reithoffer's carnival did business in the jurisdiction (R., 46). Mr. Reithoffer stated that sponsorship is often secured by his carnival even when not required by law, and that such sponsorship is helpful to his business (R., 71-73, 79, 84-85).

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I. NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED.

A. Section 7-3, Fairfax County Code, Does Not Deny Appellant Due Process or Equal Protection in Contravention of Article XIV of the Constitution of the United States.

Appellant argues (App. Br., pp. 14-15) that § 7-3 is a regulatory enactment rather than a revenue measure. This contention is without support in the record below, and the trial court specifically ruled on the validity of the ordinance as a revenue producing tax.

An ordinance imposing a local license tax for the privilege of operating a business is presumed to be reasonable and valid. The burden of proving the invalidity of the ordinance lies with the complaining party. *Green* v. *Frazier,* 253 U.S. 233, 239, 64 L.Ed. 878, 881, 40 S.Ct. 499 (1920); *Langston* v. *City of Danville,* 189 Va. 603, 54 S.E.2d 101 (1949).

The ordinance challenged by Appellant recognizes two separate types of carnival activity for licensing purposes. Carnivals operated as fund-raising activities by local civic organizations under special use permit are taxed at a lower rate than carnivals operated

by amusement companies without local sponsorship in zoning categories where the carnival is permitted as a use of right. It is clear that general classes of business activities may be so subdivided into particular classes for the purposes of license taxation. *Southwestern Oil Co.* v. *Texas,* 217 U.S. 114, 126, 54 L.Ed. 688, 694, 30 S.Ct. 496 (1909); *McKenney* v. *City Council of Alexandria,* 147 Va. 157, 136 S.E. 588 (1927).

Courts accord a presumption of reasonableness to the classification of occupations contained in licensing statutes and ordinances. *Green* v. *Frazier, supra; Home Brewing Co.* v. *City of Richmond,* 181 Va. 793, 27 S.E.2d 188 (1943). The judgment of the governing body imposing the license should, moreover, be given great weight so that an ordinance will not be struck down if any state of facts can reasonably be conceived to sustain it. *Rast* v. *Van Deman & Lewis Co.,* 240 U.S. 342, 357, 60 L.Ed. 679, 687, 36 S.Ct. 370 (1915); *Quong Wing* v. *Kirkendall,* 223 U.S. 59, 56 L.Ed. 350, 32 S.Ct. 192 (1912); *Manhattan Company* v. *County Board of Arlington County,* 197 Va. 765, 91 S.E.2d 408 (1956).

The evidence at trial showed that the general class of carnival businesses had been subdivided into two separate and distinct sub-classes for licensing purposes. One sub-class is comprised of carnivals operated as uses of right in the I-G and I-L zoning districts of Fairfax County. These carnivals are run by amusement companies for profit. They are not sponsored by local civic organizations and may operate in a community for periods varying from one week to one month (R., 56). The other sub-class is comprised of carnivals sponsored by local charitable organizations as fund-raising activities under special use permit, as provided

by the local zoning ordinance. Such special use operations must conform to the requirements for local participation in carnival operation set forth by § 30-7.2.6.1.4 Fairfax County Code (App. Br., Appendix A). Responsibility for the operation of the carnival, therefore, lies not only with its owner, but with its local sponsor as well. The sponsor has permanent ties to the local community and its members may assist in, and share responsibility for, staffing the carnival shows, as well as advertisement, and sales of tickets in the community (R., 72-73, 79). Thus, the means and method by which a carnival is conducted differs for the two sub-classes of business created by the challenged license tax.

It is proper for a legislative body to make the differences in method and character of businesses the basis of classification for taxation. *Louis K. Liggett Co.* v. *Lee,* 288 U.S. 517, 532, 77 L.Ed. 929, 936, 53 S.Ct. 481 (1932); *H. L. Carpel of Richmond, Inc.* v. *City of Richmond,* 162 Va. 833, 175 S.E. 316 (1934). This Court has, for example, affirmed the constitutionality of a license tax imposed upon persons and corporations carrying on the business of refining sugar and molasses, which exempted planters and farmers grinding and refining their own sugar and molasses. *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 45 L.Ed. 102, 21 S.Ct. 43 (1900). In *Heisler* v. *Thomas Colliery Co.,* 260 U.S. 245, 67 L.Ed. 237, 43 S.Ct. 83 (1922) it was held that Pennsylvania might impose a license tax on the mining of anthracite coal, while none was put on bituminous coal. *See Singer Sewing Machine Co.* v. *Brickell,* 233 U.S. 304, 58 L.Ed. 974, 34 S.Ct. 493 (1914); *Armour Packing Co.* v. *Lacy,* 200 U.S. 226, 50 L.Ed. 451, 26 S.Ct. 232 (1906); *W. W. Cargill Co.*

v. *Minnesota,* 180 U.S. 452, 45 L.Ed. 619, 21 S.Ct. 423 (1901).

In order for Appellant to successfully challenge the constitutionality of the carnival licensing ordinance, it must prove that its carnival is precisely the same as those included in the class of carnivals alleged to be favored. *Bradley & Co.* v. *City of Richmond,* 110 Va. 521, 526, 66 S.E. 872, 874, *aff'd* 227 U.S. 477, 57 L.Ed. 603, 33 S.Ct. 318 (1913). This burden was not met by Appellant at trial. The evidence, in fact, clearly shows the difference in method of operation and character of the two classes of carnival business licensed by Fairfax County. This Court should not inquire into the wisdom or propriety of the classification made by Appellee, Board of Supervisors of Fairfax County, in enacting the carnival license tax. It need only determine whether the record shows a reasonable basis for distinction between the classes of carnival activity established by the ordinance. *State Board of Tax Commissioners* v. *Jackson,* 283 U.S. 527, 75 L.Ed. 1248, 73 A.L.R. 1464 (1931).

> It is not the function of this court . . . to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. *Such differences need not be great.* (Emphasis added).

Id. at 537-538 and 1256.

There is no suggestion in Appellant's Jurisdictional Statement, nor was evidence produced at trial, to prove a lack of uniformity in treatment within each of the sub-classes of carnival business established by the challenged license tax. Likewise, Appellant's evidence and

arguments do not establish that the amount of license tax levied against either sub-class of carnival was great enough to prohibit the pursuit of this occupation or to be confiscatory in its application to either sub-class.

B. Section 30-7.2.6.1.4 Fairfax County Zoning Ordinance Does Not Deny Appellant Due Process or Equal Protection in Contravention of Article XIV of the Constitution of the United States.

It is well settled that reasonable zoning ordinances are constitutional and a valid exercise of the police power of the states. *Nectow* v. *Cambridge,* 277 U.S. 183, 72 L.Ed. 842, 48 S.Ct. 447 (1928); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct 114 (1926).

Particular zoning measures must, of course, observe constitutional guarantees of personal and property rights. Zoning legislation is not void, however, unless it is unreasonable and arbitrary, in excess of municipal power, or an abuse of legislative or administrative discretion. *Nectow, supra; Euclid, supra; Zahn* v. *Board of Public Works of Los Angeles,* 274 U.S. 325, 71 L.Ed. 1074, 47 S.Ct. 594 (1927).

Moreover, zoning ordinances are presumptively reasonable, valid, and constitutional and the burden of proof is on the party challenging the ordinance to clearly show the contrary. *Zahn, supra* at 328 and 1076; *Board of County Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959). This is particularly true since zoning is governmental and legislative in character and constitutes an exercise of the police power to promote the general welfare. *Euclid, supra; State of Washington* v. *Roberge,* 278 U.S. 116, 73 L.Ed. 210, 49 S.Ct. 50 (1928); *Blankenship* v. *City of Richmond,* 188 Va. 97, 49 S.E.2d 321 (1948).

Appellee, Board of Supervisors of Fairfax County, has made a legislative determination that carnivals, circuses, fairs, horse shows, the sale of seasonal commodities, and other similar activities are appropriate uses of right on land zoned to the I-G and I-L categories. In these two categories a carnival may be conducted without the requirement of sponsorship by a local civic organization or any of the other conditions for operation of carnivals as special uses set forth in § 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance. Appellee's judgment concerning the zoning categories in which carnivals are permitted as uses of right should be upheld by this Court unless it appears that the restriction of carnivals to these categories is clearly arbitrary and unreasonable. *West Brothers Brick, Inc.* v. *Alexandria,* 169 Va. 271, 192 S.E. 881 (1937), *app. dis.* 302 U.S. 658, 82 L.Ed. 508, 58 S.Ct. 369 (1938).

Section 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance allows the operation of carnivals and other similar activities under special use permit where they are not allowed as uses of right. Appellee, Board of Supervisors of Fairfax County, is specifically authorized by state law to make such special exceptions from the general provisions of its local zoning ordinance under suitable regulations and safeguards. Section 15.1-491(c) *Va. Code Ann.* (1950), as amended.[1]

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[1] § 15.1-491. *Permitted provisions in ordinances; amendments.* A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

• • •

(c) For the granting of special exceptions under suitable regulations and safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the right to issue such special exception or use permit.

In general, statutes and ordinances which allow special uses or exceptions under reasonable conditions are, like other zoning laws, presumed valid and the burden is on the party challenging the ordinance to prove its invalidity. 8 McQuillin, *Municipal Corporations* § 25-161; *Zahn, supra; Board of County Supervisors* v. *Carper, supra.* This inclusion of special use provisions in comprehensive zoning ordinances

> . . . permits the inclusion into the zoning pattern (either in all zones or in certain particular zones) of uses considered by the legislative body to be essentially desirable (or essential) to the community, its citizenry or to substantial segments thereof, but where the nature of the use or its concomitants (traffic congestion, density of persons, noise, effect on values, safety or health) militate against its location at every location therein or in any location without restrictions or conditions tailored to fit the special problems which the use presents.

2 Rathkopf, *The Law of Zoning and Planning* § 54-1.

Appellee, Board of Supervisors of Fairfax County, has determined that carnivals operated as fund-raising activities by local civic and charitable organizations may exist as special uses where not allowed as uses of right. Such special uses are permitted, however, only where they comply with the special requirements for carnival operation set out in § 30-7.2.6.1.4 of the Fairfax County Zoning Ordinance. These requirements produce a high degree of local control over, and responsibility for, the carnival operation. They constitute the "suitable regulations and safeguards" for the surrounding community demanded by § 15.1-491(c) of the Code of Virginia, *supra,* if special use permits are to be granted. The ordinance should not be set aside by this Court, since Appellant Reithoffer's, Inc., has failed to

show that it is clearly unreasonable and arbitrary. *Euclid, supra; Zahn, supra; West Brothers Brick Co., supra; Board of County Supervisors* v. *Carper, supra.*

C. The Challenged Ordinances Are Not a Burden on Interstate Commerce in Contravention of Article I, Section 8 of the Constitution of the United States.

The contention (App. Br., pp. 12-14), that Section 30-7.2.6.1.4 Fairfax County Zoning Ordinance (App. Br., Appendix A), places an unconstitutional burden on interstate commerce is unsupported by law and the facts of the case.

Section 30-7.2.6.1.4 applies to Appellant Reithoffer's, Inc., only by virtue of that Company's intrastate business, carried on entirely within Fairfax County, Virginia. It is well settled that state or local police regulations will be sustained where they impose no direct burden on, or only incidentally affect interstate commerce. *Asbell* v. *State*, 209 U.S. 251, 52 L.Ed. 778, 28 S.Ct. 485 (1908); *Field* v. *Barber Asphalt Paving Co.*, 194 U.S. 618, 48 L.Ed. 1142, 24 S.Ct. 132 (1903). The record below clearly demonstrates that, although Apellant takes its carnival show from state to state, it carries on its business on a local basis. Travel between the states is only incidental to the operation of carnival games, food stands, concessions and rides which take place entirely within the jurisdiction where the carnival is located.

Even assuming, however, that Appellant is transacting its carnival business in interstate commerce, the burden placed upon it by § 30-7.2.6.1.4 is, at most, an indirect and insubstantial one. Appellant's Jurisdictional Statement incorrectly asserts that § 30-7.2.6.1.4 compels all carnivals to secure sponsorship by local civic

associations as a prerequisite to doing business in Fairfax County (App. Br., p. 12). In fact, the ordinance only applies to locally sponsored carnivals operating under special use permit in certain zoning categories within the County. Amusement companies, such as Appellant Reithoffer's, Inc., may operate their businesses without local sponsorship in those zoning categories where carnivals are permitted as a use of right. Moreover, there is ample evidence in the record below to show the existence of sites in Fairfax County which are suitable for the operation of carnivals where no local sponsorship is required (R., 40-45). There is no constitutional prohibition against a local ordinance which, like § 30-7.2.6.1.4, does not directly interfere with or unduly burden interstate commerce. *Nippert* v. *City of Richmond,* 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586 (1945).

States and their political subdivisions may make valid enactments, in the exercise of their legislative power, to promote the welfare of their citizens, even though in their operation they may have an effect on interstate commerce. *Pennsylvania Railroad Co.* v. *Hughes,* 191 U.S. 477, 48 L.Ed. 268, 24 S.Ct. 132 (1903); *Atlantic Coast Line Co.* v. *Commonwealth,* 102 Va. 599, 46 S.E. 911 (1904). Here, Appellee, Board of Supervisors of Fairfax County, has enacted an ordinance which, along with the other provisions of its comprehensive zoning legislation, limits and conditions the operation of carnivals and other similar activities in the County. These ordinances are properly enacted to promote the reasonable use of land and protect the citizens of Fairfax County in the enjoyment of their property. *Nectow, supra; Village of Euclid, supra.*

Appellant has failed to demonstrate that the burden upon interstate commerce imposed by § 30-7.2.6.1.4., if any, is direct or substantial. Moreover, there is a clear public benefit accruing from the ordinance as a part of a rational comprehensive zoning scheme designed for the benefit of the citizens of Fairfax County.

CONCLUSION

For the foregoing reasons, Appellee Board of Supervisors of Fairfax County, Virginia, moves that the Appeal of Reithoffer's, Inc., be dismissed.

Respectfully submitted:

FREDERIC LEE RUCK
County Attorney

WILLIAM DANA SHAPIRO
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Telephone: (703) 691-2421
Counsel for Appellee